21-874

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~356~~ 79

THE COUNTY OF LEE, PLAINTIFF IN ERROR,

vs.

HENRY CLEWS & THEODORE S. FOWLER, AS HENRY CLEWS & COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF ALABAMA.

FILED DECEMBER 10, 1872.

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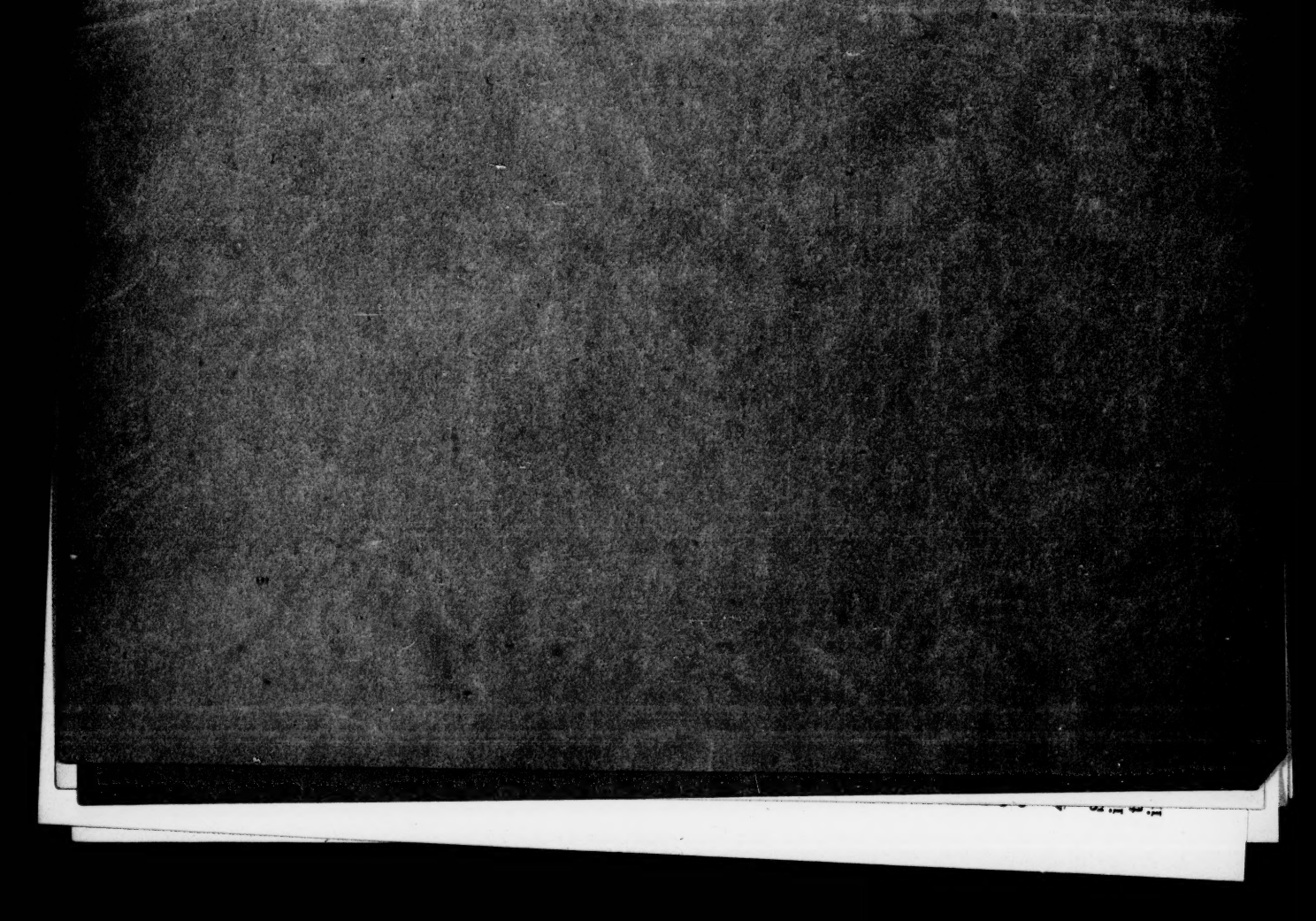

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1 May term 1872.

At a district court of the United States for the middle district of Alabama, begun and holden at Montgomery, Alabama, on the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy-two.

Present: The honorable Richard Busteed, judge of said court; John A. Minnis, esquire, United States district attorney, and Robert W. Healy, United States marshal, by whom the court was duly opened at 12 o'clock m., and the following proceedings had:

2 UNITED STATES OF AMERICA:

In the district court of the United States for the middle district of Alabama, May term, 1872.

Henry Clews, who is a citizen of the State of New York, and Theodore S. Fowler, who is also a citizen of the State of New York, the two doing business together in the city and State of New York as partners and bankers, under the name and style of Henry Clews & Co., complain of the county of Lee, a municipal corporation, duly organized and existing under and by virtue of the laws of the State of Alabama, which said corporation is a citizen of the State of Alabama and of the district aforesaid; and thereupon said plaintiffs claim of the said defendant, which is a corporation duly incorporated, and treated as such by the laws of the said State of Alabama, the sum of sixteen thousand dollars, ($16,000,) being the amount due upon and for four hundred coupons, each for forty dollars, which said coupons were attached to one hundred of the bonds of said corporation, which said bonds are numbered from one to one hundred, both inclusive, each of said bonds being, in
3 legal effect and substance, as follows:

"UNITED STATES OF AMERICA,

"*State of Alabama, county of Lee:*

"No.] [$1,000.00.

"Twenty-year eight per cent. bond, issued in payment of stock of the Eufaula, Opelika, Oxford, and Guntersville Railroad.

"Know all men by these presents, that the county of Lee, of the State of Alabama, acknowledges to owe the Eufaula, Opelika, Oxford, and Guntersville Railroad Company, or the bearer hereof, one thousand dollars, on the first day of January, A. D. eighteen hundred and ninety, at the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company, in the city of New York, with interest thereon at the rate of eight per centum per annum, payable on the first days of July and January of each year, at said agency in the city of New York, upon the presentation and surrender of the coupons hereto attached as they severally become due. This bond being one of a series of one hundred bonds, of one thousand dollars each, numbered from one to one hundred, inclusive, making an aggregate of one hundred thousand dollars issued by said county of Lee under authority and in pursuance of an act of the general
4 assembly of the State of Alabama, entitled 'An act to authorize the several counties, towns, and cities of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their interests,' approved December 31st, 1868.

1,000 dollars. 1,000 dollars.

"In witness whereof the judge of probate and county treasurer have signed this bond and caused the seal of the court of probate of said county of Lee to be hereto affixed this first day of January, A. D. eighteen hundred and seventy.

"DAVID READ,
"*Judge of Probate.*
"A. B. GRIFFIN,
"*County Treasurer.*"

[SEAL OF PROBATE COURT.]
(Across the face on page 3:) $1,000.

Attached to each of said bonds were forty coupons, numbered from one to forty inclusive, the first coupon on each of said bonds being in legal effect and substance as follows:

"STATE OF ALABAMA, *County of Lee:* [$40

"Forty dollars will be due and payable on the 1st day of July, 1870, at the agency of the Eufaula, Opelika, Oxford and Guntersville R. R Co., in the city of New York, being six months' interest on bond No. — for 1,000 00 issued by said county of Lee in payment of subscription to Eufaula, Opelika, Oxford and Guntersville R. R. Co.

"A. B. GRIFFIN,
"*Treasurer.*"

And all the other coupons on said bonds being of the same sub
5 stance and legal effect, with the exception of the dates of payment thereof, the first coupon being payable as aforesaid on the first day of July, 1870, and one of said coupons successively falling due semi-annually thereafter until and up to and including the 1st day of January, 1890. The said four coupons now due on each of said bonds and sued for in this action are numbered from one to four, inclusive, on each of said bonds, each of said coupons being for forty dollars, and one hundred of said coupons fell due on the 1st day of July, A. D. 1870; one hundred of said coupons fell due on the 1st January, 1871; and one hundred of said coupons fell due on the 1st day of January, 1872, amounting in the aggregate to sixteen thousand dollars. Plaintiffs aver that each and every one of said four hundred coupons last mentioned, together with interest thereon from the respective dates at which they severally fell due, are still due and unpaid. And the said plaintiffs further aver that they are the bona fide owners and bearers of said four hundred coupons, which, together with the said bonds to which they were attached, were executed and put into circulation with the other coupons above mentioned by the said defendants and
6 purchased by the plaintiffs for value before any of them fell due, and that before the commencement of this suit the plaintiffs duly presented each of said four hundred coupons above described as having fallen due for payment at the agency of the Eufaula, Opelika, Oxford & Guntersville Railroad Company in the city of New York, which said railroad company is now otherwise known as the East Alabama and Cincinnati Railroad Company, then and there demanded payment of each of said last mentioned four hundred coupons after its maturity and before the commencement of this suit, but the defendant failed and refused to pay said coupons or any part thereof, and no part thereof has been paid, of all of which the defendant had notice before the commencement of this suit. This suit is brought to recover the amount due on said four hundred coupons herein-above described as having fallen due before this suit was commenced, and interest thereon accord-

ing to their tenor and effect, all of which defendant hath hitherto and does still wholly fail and refuse to pay, to the damage of the plaintiffs twenty-five thousand dollars.

RICE, CHILTON & JONES,
Pl'ffs' attorneys.

7 UNITED STATES OF AMERICA:

District court of the United States, for the middle district ofAlabama.

The President of the United States of America to the marshal of said district, greeting:

You are hereby commanded to summon the county of Lee, a municipal corporation existing under and by virtue of the laws of the State of Alabama, and which is a citizen of the State of Alabama, to appear before the hon. district court aforesaid at the place of holding said court, at Montgomery, on the fourth Monday of May next, to answer the complaint of Henry Clews and Theodore S. Fowler, (partners and bankers under the name and style of Henry Clews & Co.,) and as such doing business in the city of New York, who are citizens of the State of New York, and have you then and there this writ.

Witness the hon. Richard Busteed, judge of the said court, the fourth Monday of November, in the year of our Lord one thousand eight hundred and seventy-one.

Issued the 16th day of April, in the year of our Lord one thousand eight hundred and seventy-two.

Attest:

L. S.] E. C. V. BLAKE,
Clerk U. S. Dist. Court Mid. Dist. of Ala.

I acknowledge myself security for costs, at the instance of the plaintiff in the above suit.

FERRIE HENSHAW.

8 Received in office this 22d day of April, 1872.

R. W. HEALY,
U. S. Marshal.

Executed by leaving copy of the within summons and with the hon. David Read, judge of the probate court of said county of Lee, the defendant, this the 29th day of April, 1872.

R. W. HEALEY,
U. S. Marshal.
By ISAAC HEYMAN,
Sp. Deputy.

9 District court of the United States, middle district of Alabama.

THE COUNTY OF LEE, DEFENDANT,
vs.
HENRY CLEWS & CO., PLAINTIFF.

First. And now comes the defendant by its attorneys, Stone & Clopton, and defends the wrong, and when, &c., and says that the said defendant did not undertake or promise in manner and form, as the said plaintiffs have above thereof complained against it, and of this it puts itself upon the country, &c.

Second. And for further plea in this behalf, defendant says actio non, because he says that, on the 26th day of November, 1870, Alexander Frayer, Julius C. Phillips, and other persons who were at that time and still are citizens and tax-payers of the said county of Lee, being the said defendant, filed their bill of complaint in the chancery court for said county of Lee, against James J. Green as the tax-
10 collector of said county of Lee, who was then the tax-collector thereof, the said Eufaula, Opelika, Oxford, and Guntersville Railroad Company, and John L. Pennington who was the president of railroad company; and the court of county commissioners of said county Lee, in which it was alleged, among other things, that the said court of county commissioners had made an assessment of taxes upon the property of the complainants and other citizens of said county of Lee, for the benefit of said railroad company, and that the said James J. Green was proceedings to collect said taxes; that said assessment of taxes was illegal, and the subscription to the capital stock of said railroad company was illegal, and said cause involved the validity of said bonds in the complaint mentioned and the coupons attached thereto; defendant avers that said bonds and coupons attached thereto mentioned in the complaint were issued in payment for said subscription, and said taxes were assessed and being collected for the purpose of a portion of said coupons; and defendant further avers that such proceedings were
11 thereupon had upon said bill of complaint and the said cause; that afterwards, to wit, at the December term, 1871, the said chancery court made and rendered a decree, by which it was ordered, adjudged, and decreed that the defendants to said bill of complaint, they and their successors, agents, and attorneys are jointly and severally restrained and perpetually enjoined from collecting or attempting to collect said taxes, or coerce payment of said subscription, or said bonds on account of the principal or interest thereof, and that said subscription and said bonds be, and the same are hereby, cancelled as to said bonds, and rescinded as to said subscription, as by the record and proceedings thereof remaining in said chancery court more fully and at large appears, and which said decree still remains in full force and effect, and not in the least reversed or made void; and the defendant avers that at the time of the filing of the said bill of complaint and for a long time thereafter, to wit, at the time of the rendition of said decree the said railroad company, one of the parties to said suit
12 in chancery court, held and owned an interest in said bonds and coupons, and this the defendant is ready to verify, &c.

Third. And for further plea in this behalf, the defendant says actio non, because he says that the bonds in the complaint mentioned were issued in payment for a subscription made by the court of county commissioners of said county of Lee, of one hundred thousand dollars to the capital stock of the said Eufaula, Opelika, Oxford, and Guntersville Railroad Company, and which subscription purported to be made under and by virtue of an act of the general assembly of the State of Alabama, entitled "An act to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may deem consider most conducive to their respective interests," approved December 31, 1868, by the first section of which act it is provided "That any and every county of the State of Alabama, situate upon or adjacent to the main or branch lines of the railroads of this
13 State, as such lines are or may be hereafter located by the companies owning and controlling said roads respectively, is author-

ised and empowered to subscribe for, take, and pay for the capital stock of such of the railroad companies of the State as they may deem most conducive to their interests, as hereinafter provided. The said railroad companies, by their president and a majority of their directors, may, in writing, propose to any such county that it shall subscribe for and take an amount of their capital stock, to be named in said proposal, at a certain price per share, and pay for the same in such bonds of the county as shall be set forth in said proposal;" and under and by virtue of no other power or authority whatever. And the defendant further avers, that said Eufaula, Opelika, Oxford, and Guntersville Railroad Company did not, prior to or since the making of said subscription to said capital stock and the issue of said bonds in the complaint mentioned, by its president and the majority of its directors, in
14 writing, propose to said defendant that said defendant shall subscribe for and take an amount of its capital stock named in such proposal, at a certain price per share, and pay for the same in such bonds of the defendant as shall be set forth in said proposal, and that said subscription to said capital stock was made, and said bonds and coupons, in the complaint mentioned, were issued without authority of law, and are void, and that the plaintiffs are not bona fide holders thereof without notice, and this the defendant is ready to verify, &c.

STONE & CLOPTON,
Att'ys for Def't.

Filed 20th May, 1872.

E. C. V. BLAKE,
Clerk.

United States district court for the middle district of Alabama, sitting at Montgomery.

HENRY CLEWS & CO., PLAINTIFFS,
vs.
THE COUNTY OF LEE, DEFENDANT.

15 1st. Come the said plaintiffs, and as to the plea by said defendant first above pleaded, and which the defendant prayed may be enquired of by the county, the plaintiffs do the like.

2d. And the said plaintiffs, as to said plea of said defendant by it secondly above pleaded, saith that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them the said plaintiffs from having or maintaining their aforesaid action thereof against it the said defendant, and that they the said plaintiffs are not bound by law to answer the same; and the said plaintiffs, according to the form of the statute in such cases made and provided, state and show to the court the following grounds of demurrer to said second plea, that is to say—

1st. For that the said second plea does not aver or show that the plaintiffs in this suit were either parties or privies to the said suit in said chancery court mentioned in said second plea, nor does it
16 state or disclose any fact which can make said suit in said chancery court, or any proceedings or decree therein, operate as a defense or bar to this suit.

2d. For that the matters stated in said second plea do not constitute a bar to this suit or a defense thereto.

3d. For that the said second plea does not disclose, aver, or allege any

matters or facts which preclude the plaintiffs from recovering under their said complaint in this suit.

4th. For that the perpetual injunction mentioned in said second plea was decreed not before but long after the said bonds and coupons mentioned in the complaint had been issued and purchased for value by plaintiffs as alleged in the complaint.

5th. For that said second plea does not deny that the plaintiffs are and were the owners and bearers for value of said bonds and coupons mentioned in the complaint, as alleged in the complaint.

6th. For that said second plea does not disclose or show the na-
17 ture or extent of the interest which it alleges the said railroad corporation had in said bonds and coupons at the filing of the said bill, and at the rendition of the decree mentioned in said second plea.

3rd. And the said plaintiffs, as to the said plea of the defendant by it thirdly above pleaded, saith that the same and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude them, the said plaintiffs, from having or maintaining their aforesaid action thereof against it, the said defendant; and that they, the said plaintiffs, are not bound by law to answer the same. And the said plaintiffs, according to the form of the statute in such cases made and provided, state and show to the court the following grounds of demurrer to said third plea, that is to say:

1st. For that said third plea fails to deny or tender issue upon the allegation of the complaint to the effect that the plaintiffs were, at and before the commencement of this suit, the owners and bearers
18 of said bonds & coupons mentioned in the complaint for value.

2d. For that the matters stated in said third plea do not constitute a bar to this suit, or a defence thereto.

3rd. For that said third plea does not allege, aver, or disclose any matter or facts which preclude the plaintiffs from recovering under their said complaint in this suit.

4th. For that said third plea is double and void for duplicity.

5th. For that said third plea discloses and shows that upon a proper application, the defendant was authorized to execute and issue said bonds and coupons mentioned in the complaint, and does not deny that the plaintiffs are and were the owners and bearers for value of said bonds and coupons before any of them fell due, as alleged in the complaint.

6th. For that said third plea is not verified by any oath or affidavit whatever.

RICE, CHILTON & JONES,
Atty's for Plaintiffs.

Filed 25th May, 1872.

E. C. V. BLAKE, *Clerk.*

19 UNITED STATES OF AMERICA,

Southern District of New York, City, County, and State of New York, ss:

Be it remembered, that on this twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-two, I, James Betts Metcalf, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depend-

ing in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at room No. 1, No. 51 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, Henry Clews, to testify and the truth to say, on the part and
20 behalf of the plaintiffs, in a certain suit or matter of controversy, now pending and undetermined, in the district court of the United States for the middle district of Alabama, wherein Henry Clews and Company, a firm composed of Henry Clews and Theodore S. Fowler, are plaintiffs, and the county of Lee, in the State of Alabama, is the defendant; and the said Henry Clews being about the age of thirty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of controversy aforesaid, I did carefully examine the said Henry Clews, and he did thereupon depose, testify, and say as follows, viz:

I reside in the city, county, and State of New York, and am a member of the firm of Henry Clews & Company, who are bankers engaged in business at No. 32 Wall street, in said city; my partner in said firm is Theodore S. Fowler, also of New York City. My said firm are the owners and holders of one hundred bonds, each of the denomination of one thousand dollars, and numbered from one to one hundred, both inclusive, said bonds being issued by and being the bonds of the
21 county of Lee, in the State of Alabama, and bearing date on the first day of January, 1870, and, according to the tenor thereof, falling due January 1st, 1890, being payable, with the coupons to each of said bonds annexed, at the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company, in the city of New York. The coupons so annexed to each of said bonds are payable at said agency, semi-annually, on the first days of July and January in each year. Four hundred coupons, each for the sum of forty dollars, annexed to said bonds are due and wholly unpaid, said coupons having matured as follows: One hundred coupons for $40 each were due July 1st, 1870; one hundred coupons for $40 each were due Jan'y 1st, 1871; one hundred coupons for $40 each were due July 1st, 1871; one hundred coupons for $40 each were due Jan'y 1st, 1872. My said firm of Henry Clews & Co. at the time of receiving said bonds were designated as the agency of the Eufaula, Opelik', Oxford, and Guntersville Railroad Company in the city of New York, at which the coupons on said bonds would be paid as fast as said coupons became due, and also the principal of said
22 bonds at the maturity thereof. No funds have ever been deposited with my said firm, either by said county of Lee or by said railroad company, or any other corporation, or person or persons whatever, to pay said coupons or any part thereof. After said four hundred coupons became due my said firm were informed that the commission-house of Tanner, Walker & McAuerney, of No. 63 Broadway, in said city, were appointed the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company in the city of New York, and my said firm caused said four hundred coupons, of forty dollars each, then past due and unpaid, to be presented for payment at the counter of said Tanner, Walker & McAuerney, at No. 63 Broadway in the city of New York, and offered to surrender said past due four hundred coupons of forty dollars each to said last-mentioned firm upon payment of the

same, but payment thereof was refused, and said coupons are still unpaid. Said one hundred bonds of the county of Lee were received by my said firm in good faith and for value paid; both I and my said
23 firm relying upon the good faith and credit of said county of Lee that said bonds, and the coupons thereto attached, would be paid according to the tenor and effect thereof.

HENRY CLEWS.

Subscribed and sworn to before me this 22 day of May, 1872.

JAMES BETTS METCALF,
United States Commissioner Southern District of New York.

UNITED STATES OF AMERICA,
Southern District of New York,
City, County, and State of New York, ss:

Be it remembered that on this twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-two, I, James Betts Metcalf, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress, entitled "An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an
24 act entitled 'An act for the more convenient taking of affidavits and bail in civil causes, depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, did call and cause to be and personally appear before me, at my office, at room No. 1, No. 51 Chambers street, in the city of New York, in the said southern district of New York, in the State aforesaid, William M. Burnop, to testify and the truth to say, on the part and behalf of the plaintiffs, in a certain suit or matter of controversy, now depending and undetermined in the district court of the United States for the middle district of Alabama, wherein Henry Clews and Company, a firm composed of Henry Clews and Theodore S. Fowler, are plaintiffs, and the county of Lee, in the State of Alabama, is the defendant. And the said William M. Burnop, being about the age of twenty-seven years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of
25 controversy aforesaid, I did carefully examine the said William M. Burnop, and he did thereupon depose, testify, and say as follows, viz:

I reside in the city, county, and state of New York. On the twenty-third day of March, 1872, the honorable Samuel F. Rice, of Alabama, delivered to me the following described coupons of the bonds of the county of Lee, in the state of Alabama, viz: One hundred of said coupons for $40 each, due July 1, 1870; one hundred of said coupons for $40 each, due Jan. 1st, 1871; one hundred of said coupons for $40 each, due July 1st, 1871; one hundred of said coupons for $40 each, due Jan'y 1, 1873; being in all four hundred over-due coupons of forty dollars each, of said bonds of said county of Lee, which said bonds are numbered from one to one hundred, both inclusive, and instructed me to demand payment of, and to present and offer to surrender each of said past due coupons at the counter of Messrs. Tanner, Walker & McAuerney, No. 63 Broadway, in the city of New York, and upon being paid the amount of such past-due coupons, to surrender the same to said last-

mentioned firm. I thereupon, on the day aforesaid, having the
26 said above-described four hundred past due coupons in my possession, demanded payment thereof at the counter of Messrs. Tanner, Walker & McAuerney, 63 Broadway, in said city, and then and there presented said coupons for such payment, and offered to surrender the same upon being paid the amount thereof, but such payment was refused because no funds had been remitted to said last-mentioned firm to pay said coupons, and I thereupon returned said coupons unpaid to said Samuel F. Rice.

WM. M. BURNOP.

Subscribed and sworn to before me this 22d day of May, 1872.

JAMES BETTS METCALF,
United States Commissioner Southern District New York

UNITED STATES OF AMERICA,
Southern District of New York, ss :

I, James Betts Metcalf, a commissioner duly appointed by the circuit court of the United States for the southern district of New York, in the second circuit, under and by virtue of the acts of Congress entitled "An act for the more convenient taking of affadavits and bail in civil causes, depending in the courts of the United States"
27 passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled, 'An act for the more convenient taking of affidavits and bail in civil causes depending in the courts of the United States,'" passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, the witnesses were material and necessary in the cause in the caption of the said deposition named, and that they both reside in the city of New York, a place more than one hundred miles distant from the place where said cause will be tried, to wit, the city of Montgomery, in the State of Alabama. I further certify that no notification of the time and place of taking the said deposition signed by me was made out and served on the adverse party to be present at the taking of the depositions, and to put interrogatories, if he or they might think fit, inasmuch as neither the adverse party, nor its attorney, were within one hundred miles of the place of taking such depositions.

28 I further certify, that on the twenty-second day of May, in the year of our Lord one thousand eight hundred and seventy-two, I was attended by the counsel for the plaintiffs, Hiram B. Crosby, esq., and by the witnesses, who were of sound mind and lawful age, and the witnesses were by me first carefully examined and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and the depositions were by me reduced to writing, in the presence of the witnesses, and from their statements, and after carefully reading the same to the witnesses, *and from their statements, and after carefully reading the same to the witnesses*, they subscribed the same in my presence. I have retained the said depositions in my possession for the purpose of depositing the same with my own hand in the U. S. post-office in the city of New York, addressed to the court for which the same were taken.

And I do further certify, that I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said
29 caption.

In testimony whereof, I have hereunto set my hand and seal,

this twenty-third day of May, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

JAMES BETTS METCALF,
United States Commissioner, duly appointed by the circuit court of the United States, for the southern district of New York in the second circuit.

{U. S. COM. SEAL OF JAMES BETTS METCALF, SO. DIST. OF N. Y.}

Published in open court, and filed May 28, 1872.

E. C. V. BLAKE,
Clerk.

30 May term, 1872.

In the district court of the United States for the middle district of Alabama.

WEDNESDAY, *May 29th*, 1872.

The court met at 10 o'clock a. m., pursuant to adjournment. Present as on yesterday (the hon. Richard Busteed, judge.)

HENRY CLEWS & CO. *vs.* THE COUNTY OF LEE. } 1791.

This day came the parties by attorneys, and thereupon came a jury of twelve good and lawful men, to wit: , and eleven others, who being duly elected, empannelled, sworn and charged well and truly to try the issues joined and a true verdict to render according to the evidence upon their oaths, do say: We, the jury, find all the issues in favor of the plaintiffs, and assess the plaintiffs' damages at thirteen thousand seven hundred and twenty-two $\frac{44}{100}$ dollars. It is therefore considered by the court that the plaintiffs recover of the defendant thirteen thousand
31 seven hundred and twenty-two $\frac{44}{100}$ dollars, the damages assessed by the jury as aforesaid, and also all the costs incurred or expended in this cause for all which let execution issue.

RICHARD BUSTEED,
Judge.

32 THE UNITED STATES OF AMERICA, *ss.*

District court of the United States for the middle district of Alabama, May term, 1872.

HENRY CLEWS AND THEODORE S. FOWLER, partners and bankers under the firm name of Henry Clews & Co., *vs.* THE COUNTY OF LEE.

Be it remembered, that this case was called for trial on the third day of said term. The defendant filed the plea of the general issue and two special pleas, the said special pleas being numbered second and third respectively, and being the special pleas on file. The plaintiffs joined issue on the plea of the general issue, and filed separately and severally a demurrer to each of said two special pleas. The causes of demurrer to said special plea numbered second, being the first special plea, are

the causes assigned in the demurrer to said first special plea on file; which demurrer to said first special plea, numbered second, was sustained by the court, and defendant duly excepted thereto. The causes of demurrer to said special plea numbered third, being the second special plea, are the causes of demurrer assigned in the demurrer on file; which demurrer to said second special plea was sustained by the court, and defendant duly excepted thereto. Issue in law had been joined on each of said demurrers. The parties then went to trial on the plea of the general issue, and a jury was impannelled and sworn to try the issue so joined. On the trial the plaintiff offered to read
34 in evidence one hundred bonds, being the bonds in the complaint mentioned and described, numbered from one to one hundred, both inclusive, and a copy of which is set out in the complaint, and forty coupons attached to each of said bonds, making three hundred and twenty coupons, each of said coupons being for forty dollars, and being due before the commencement of this suit, a copy of each coupon being set out in the complaint, except the difference as to the time of payment, and being the same coupons described and mentioned in the complaint. When said bonds and coupons were offered to be read in evidence, the defendant objected thereto, and specified the following grounds of objections, viz: 1st. That there was no evidence that said bonds and coupons were authorized to be issued by the defendant. 2nd. There was no evidence that the seal annexed to each of said bonds is or was the seal of said probate judge, or of the defendant. And 3d. That neither said bonds or coupons were stamped with revenue stamps of the United States as required by the act of Con-
35 gress. The court overruled said objection, and admitted said bonds and coupons to be read in evidence, and defendant duly excepted thereto. The said bonds and coupons were then read in evidence by the plaintiffs. The plaintiffs then read in evidence the depositions of Henry Clews and William Burnop, which depositions are on file and made a part of this bill of exceptions. The said Henry Clews in his said depositions deposed and testified as follows:

"I reside in the city, county, and State of New York, and am a member of the firm of Henry Clews & Co., who are bankers engaged in business at No. 32 Wall street in said city; my partner in said firm is Theodore S. Fowler, also of New York City. My said firm are the owners and holders of one hundred bonds, each of the denomination of one thousand dollars, and numbered from one to one hundred, both inclusive, said bonds being issued by and being the bonds of the county of Lee, in the State of Alabama, and bearing date on the first day of January, 1870, and according to the tenor thereof falling due January 1st, 1890, being payable with the coupons to each of said
36 bonds annexed at the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company, in the city of New York. The coupons so annexed to each of said bonds are payable at said agency semi-annually, on the first days of July and January in each year. Four hundred coupons, each for the sum of forty dollars, annexed to said bonds, are due and wholly unpaid, said coupons having matured as follows: One hundred coupons for $40 each were due July 1st, 1870; one hundred coupons for $40 each were due Jan'y 1st, 1871; one hundred coupons for $40 each were due July 1st, 1871; one hundred coupons for $40 each were due Jan'y 1st, 1872. My said firm of Henry Clews & Co. at the time of receiving said bonds were designated as the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company, in the city of New York, at which the coupons on said bonds would be

paid as fast as said coupons became due, and also the principal of said bonds at the maturity thereof. No funds have ever been deposited with my said firm, either by said county of Lee or by said railroad company, or by any other corporation, or person or persons whatever, to
37 pay said coupons or any part thereof. After said four hundred coupons became due, my said firm were informed that the commission-house of Tanner, Walker & McAuerney, of No. 63 Broadway, in said city, were appointed the agency of the Eufaula, Opelika, Oxford, and Guntersville Railroad Company, in the city of New York, and my said firm caused said four hundred coupons of forty dollars each, then past due and unpaid, to be presented for payment at the counter of said Tanner, Walker & McAuerney, at No. 63 Broadway, in the city of New York, and offered to surrender said past due four hundred coupons of forty dollars each to said last-mentioned firm upon the payment of the same, but payment thereof was refused, and said coupons are still unpaid. Said one hundred bonds of the county of Lee were received by my said firm in good faith and for value paid; both I and my said firm relying upon the good faith and credit of said county of Lee that said bonds and the coupons thereto attached would be paid according to the tenor and effect thereof."

38 The said William M. Burnop, in his said depositions, deposes and testifies as follows, to wit:

I reside in the city of New York, county and state of New York. On the twenty-third day of March, 1872, the honorable Samuel F. Rice, of Alabama, delivered to me the following described coupons of the bonds of the county of Lee, in the State of Alabama, viz: One hundred of said coupons for $40 each, due July 1st, 1870; one hundred of said coupons for $40 each, due Jan'y 1st, 1871; one hundred of said coupons for $40 each, due July 1st, 1871; one hundred of said coupons for $40 each, due Jan'y 1st, 1872; being in all four hundred over-due coupons of forty dollars each, of said bonds of said county of Lee, which said bonds are numbered from one to one hundred, both inclusive, and instructed me to demand payment of, and to present and offer to surrender each of said past-due coupons, at the counter of Messrs. Tanner, Walker & McAuerney, No. 63 Broadway, in the city of New York, and upon being paid the amount of such past-due coupons to surrender the same to said last-mentioned firm. I thereupon, on the day aforesaid, having the said above-described four hundred past-due coupons in my possession, demanded payment thereof at the counter of Messrs.
39 Tanner, Walker & McAuerney, No. 63 Broadway, in the city of New York, and upon being paid the amount of such past-due coupons to surrender the same to said last-mentioned firm. I thereupon, on the day aforesaid, having the said above described four hundred past-due coupons in my possession, demanded payment thereof at the counter of Messrs. Tanner, Walker & McAuerney, No. 63 Broadway, in said city, and then and there presented said coupons for such payment, and offered to surrender the same upon being paid the amount thereof, but such payment was refused because no funds had been remitted to said last-mentioned firm to pay said coupons, and I thereupon returned said coupons unpaid to said Samuel F. Rice."

Samuel F. Rice, esq., was then called by the plaintiffs and sworn as a witness, who testified that the said bonds and coupons were delivered to him by the plaintiffs in the city of New York, in March, 1872, as their attorney, and that he delivered said coupons to the said witnesses, William M. Barnop, with directions to present them for payment at the office of Tanner, Walker & Auerney, in the city of New York,

40 which the witness had been informed was the office of said railroad company in the city of New York.

The defendant then offered to read a duly-certified transcript from the records of the court of county commissioners of said county of Lee in relation to said bonds. The plaintiffs inquired of defendant whether this transcript was offered in connection with any other evidence, or whether any other evidence was proposed in connection with said transcript. The defendant answered these questions in the negative. The plaintiffs agreed and admitted that said transcript was duly and properly authenticated, but objected to the same being read in evidence on the ground that it was illegal, as well as irrelevant testimony. The said transcript is made a part of this bill of exceptions, and is as follows, to wit: This being the regular term of commissioners' court held on the 5th day of April, 1869, when the following business was transacted, to wit:

Court of county commissioners, April term, 1869.

THE STATE OF ALABAMA,
Lee County:

41 Application having been made to this court by the Savannah and Memphis Railroad by the president and directors of said road; and application having been made also by the president of the Eufaula, Opelika, Oxford, and Guntersville Railroad for subscription to the said railroads by this Lee County, and the law passed or approved Dec. 31st, 1868, makes it the duty of the commissioners' court to order an election within sixty days after the meeting of said court to the qualified electors of the county: It is therefore ordered by the court that an election be held at all the precincts in the county of Lee on the 22nd day of May, 1869, for the accep'tion or rejection of the said propositions of the said railroads.

This being one of the orders passed at said term of said commissioners' court, and said minutes was signed by David Read, judge of probate.

A. F. ROGERS,
G. W. GREEN,
J. W. MORRIS,
Commissioners.

Special term of commissioners' court held September 20th, 1869, when the following order was passed, to wit:

42 The Eufaula, Opelika, Oxford, and Guntersville Railroad Company, by its president, John L. Pennington, which said railroad runs partly through the county of Lee, as said railroad has been heretofore and is now located by said company on the 12th day of April, 1869, proposed in writing that the following application be granted:

Application of the corporaters of the Eufaula, Opelika, Oxford, and Guntersville Railroad to the commissioners' court of Lee County for a subscription.

HON. DAVID READ,
Chairman Board of County Commissioners for Lee County:

SIR: I am directed by the corporators of the Eufaula, Opelika, Oxford and Guntersville Railroad Company to make application to the

board of county commissioners of the county of Lee, as provided in an act to authorize the several counties, towns, and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interest, approved December 31st, 1868, requesting said county commissioners to order an election for a subscription of one hundred thousand
43 dollars in eight per cent. bonds, to run twenty years, to the capital stock of said road as directed in an act of the general assembly of Alabama, hereinbefore mentioned. Section 2nd of said act provides that upon the application of the president and directors of any of the railroad companies of Alabama, to the commissioners' court of any county of the same, submitting proposals for a county subscription to the capital stock of the said railroad company, the commissioners' court of said county in which application is made is hereby authorized and required to order an election within sixty days after the meeting of said court, to submit the proposition of said railroad company to the qualified electors of said county for their acception or rejection. (See Acts 1868, page 514.) As will be seen from this section, the county commissioners are required to order an election where application is made within sixty days after the meeting of said court, and we would respectively request that you order said election to be holden on Saturday, the first day of May, 1869, believing that will give the people sufficient time to canvass, reflect upon,
44 and come to a wise conclusion as to the merits of our application.

A true copy of our charter, the original of which is on file in the office of the secretary state at Montgomery, is herewith transmitted.

I have the honor to be your obedient servant,

J. L. PENNINGTON,
President.

And upon the application of the Opelika, Eufaula, Oxford, and Guntersville Railroad Company, by its president, to the commissioners' court of said county of Lee, the said commissioners' court heretofore, on the 12th day of April, 1869, ordered an election to be held on Saturday, the 22d day of May, 1869, to submit the said proposition of said railroad company to the qualified electors of said county for their acceptance or rejection, and thirty days' notice of the terms and amount of each subscription, and after such notice was given, partly-written and partly-printed ballots with the words "subscription," and like other ballots with the words "no subscription" thereon were prepared for the use of the voters of said county, and the returns of said election have been made by the proper officers to the judge of probate of said county, who received esti-
45 mates, counted and published the vote thereof within three days after said election, and it was found that a majority of the qualified voters of the county who voted at said election voted for subscription. It is therefore order' the subscription voted for in behalf of said county be made to the capital stock of said Eufaula, Opelika, Oxford, and Guntersville Railroad Company in the manner and for the amount set forth in said application and registered in the office of the judge of probate. That the probate judge be and he is authorized to enter said subscription upon the books of said company in the name of the said county of Lee, and that there be delivered to the said Eufaula, Opelika, Oxford, and Guntersville Railroad Company in payment of said subscription, bonds of the county of Lee, having not less nor more than twenty years to run, with interest coupons attached for semi-annual interest, payable at such time and places as may be agreed upon between the said rail-

road company and the judge of probate of said county, and that
46 said bonds be signed by the judge of probate, and the treasurer of the county of Lee, with the seal of the court of probate affixed to said bonds.

DAVID READ,
Judge of Probate,
J. W. MORRIS,
his
CHARLES + LIPSCOMB,
mark
Commissioners.

THE STATE OF ALABAMA,
Lee County:

I, David Read, judge of probate in and for said county, hereby certify that the foregoing 5 pages contain a true and correct transcript of all the orders made by the commissioners' court of the county of Lee for the submitting of the application of the Eufaula, Opelika, Oxford and Guntersville Railroad for subscription to the capital stock of the said railroad to the qualified voters of said county of Lee, and also the order of the said court for the issuing the bonds of the said county of Lee to the said railroad company.

Given under my hand and the seal of this court at office in the city of Opelika, in said county of Lee, and State of Alabama, this 21st day of May, 1872.

47 [STAMP SEAL OF PROBATE.] DAVID READ,
Judge of Probate of Lee County, Alabama.

The court sustained said objection, and refused to allow said transcript to be read in evidence, to which ruling and refusal of the said court the defendant duly excepted.

John L. Pennington was then called by the defendant and sworn as a witness, who testified that he is now, and has been ever since its organization, the president of the said Eufaula, Opelika, Oxford, and Guntersville Railroad Company, named in said bonds; that the said bonds described in the complaint were issued early in 1870, and were obtained by plaintiffs in April, 1870, for value, part of which was paid in cash at the time, and part afterwards, as more fully stated hereinafter by this witness. The defendant then propounded to said witness the following questions: "What was done towards the organization of said railroad company, previously to making application to said county of Lee for subscription to the capital stock of said company, and the issue of said bonds?" The counsel for the plaintiffs
48 objected to said questions, and, in support of the objection, proved by said witness that all the proceedings of said company and of its president & directors were in writing and recorded. The counsel for the defendant stated that the object of the question was to show that there had been no organization of the said company, no directors elected or appointed, and no persons who under the act of the general assembly of Alabama of December 31st, 1868, could make the proposal therein required. The court sustained said objection and refused to allow any answer to be made to said question, to which ruling and refusal of the court the defendant duly excepted. The defendant then propounded to said witness the questions, "Upon what proposal were the said bonds issued; what were they issued for?" On objection of the counsel of plaintiffs, and on the same proof made in support of the last preceding objection, the court refused to allow any answer to be

made to either of said questions, and to each ruling and refusal of the court the defendant duly excepted. The said witness further
49 testified that he could not be precise as to certain occurrences without reference to the books, but his recollection is that there was but one proposal made to the defendant for subscription to the capital stock of said company and issue of bonds, and that was in writing and left with the probate judge of the said county of Lee. Thereupon the counsel for the defendant offered to show a paper to said witness and prove by him that it was a correct copy of said proposal. On objection of the counsel of plaintiffs the court refused to allow said witness as to said paper being a correct copy of said proposal, to which ruling and refusal of the court the defendant duly excepted. The said witness further testified that the plaintiffs got said bonds in April, 1870, from J. C. Staunton, to whom said bonds had been transferred on account of advances made by said Staunton after the election in said county of Lee as to subscription to the stock of said company, but before the actual issue of said bonds, and on an agreement that
50 said bonds should be transfer'ed when issued, the plaintiffs obtained said bonds in April, 1870, under advances made at that time and under an agreement to make further advances, which they have done to about one hundred thousand dollars, and hold said bonds as collateral security for said advances. It was admitted that the said court of county commissioners is a court of record. This was all the evidence adduced on the trial of this cause, and upon the foregoing evidence the court gave the following charge to the jury, to wit:

"That under the law and the evidence adduced in this cause the plaintiffs are entitled to recover the amount of the coupons read in evidence, with interest from the time of their maturity."

To which charge of the court the defendant duly excepted. All the foregoing exceptions were tendered and taken during the progress of the trial, and while the jury were at the bar; and this is presented as the defendant's bill of exceptions, and allowed, and signed, and sealed as such by the court, the honorable Richard Busteed presiding
51 and constituting the court this 10th day of June, 1872.

RICHARD BUSTEED,
Judge, &c.

We, the counsel and attorneys for the respective parties in the above-entitled case, agree upon the foregoing bill of exceptions as corrected in said cause, and that the same may be signed by the presiding judge as such.

STONE & CLOPTON,
Atty's for the Defendant.
RICE, CHILTON & JONES,
Atty's for Plaintiffs.

Filed in office June 10th, 1872.

E. C. V. BLAKE, *Clerk.*

52 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judge of the district court of the United States for the middle district of Alabama, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said district court before you, be-

tween Henry Clews and Theodore S. Fowler, partners and bankers under the name and style of Henry Clews & Co., plaintiffs, and the county of Lee, defendant, a manifest error hath happened, to the great damage of the county of Lee, as by its complaint appears: we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the first Monday of December next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being
53 inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, the first Monday in December, in the year of our Lord one thousand eight hundred and seventy-one.

[SEAL.] E. C. V. BLAKE,
Clerk U. S. District Court, Mid. Dist. of Alabama.

54 (Indorsed:) 1791. Henry Clews & Co. vs. The county of Lee. Original. Writ of error. Filed in office 4th day of June, A. D. 1872. Copy of this writ of error filed at the same time. E. C. V. Blake, clerk.

55 THE UNITED STATES OF AMERICA, *ss:*

To Henry Clews and Theodore S. Fowler, partners and bankers, under the name and style of Henry Clews & Co., greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the district court of the United States for the middle district of Alabama, wherein the county of Lee is plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, this the 4 day of June, in the year of our Lord one thousand eight hundred and seventy-two.

RICHARD BUSTEED, [SEAL.]
Judge.

Executed by serving a copy of the above citation on Samuel F.
56 Rice, the attorney of record of the plaintiff, this 5th day of June, A. D. 1872.

R. W. HEALY,
U. S. Marshal.

Before me, E. C. V. Blake, clerk of the district court of the United States for the middle district of Alabama, personally came R. W. Healy, who being by me duly sworn, makes oath that he served a copy of this citation on Samuel F. Rice, an attorney of record of the plaintiff, on the 5th day of June, 1872.

R. W. HEALY,
U. S. Marshal Mid. Dist. of Ala.

Sworn and subscribed to before me at Montgomery, this 7th day of November, A. D. 1872.

E. C. V. BLAKE,
Clerk.

(Indorsed:) 1791. Henry Clews & Co. vs. The county of Lee. Original. Citation. Filed in office this 4th day of June, A. D. 1872. A copy of this citation filed at the same time. E. C. V. Blake, clerk.

57 UNITED STATES OF AMERICA,
Middle District of Alabama, ss:

I, Elliott C. V. Blake, clerk of the district court of the United States for the middle district of Alabama, do hereby certify that the writings annexed to this certificate are true copies of their respective originals on file and remaining of record in my office, and the original writ of error and citation, copies of which are on file in my office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of Montgomery, in the middle district of Alabama, this twenty-ninth day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] E. C. V. BLAKE,
Clerk.

(Indorsement on cover:) No. 356. The county of Lee, plaintiff in error, vs. Henry Clews & Theodore S. Fowler, as Henry Clews & Co. M. Alabama D. C. U. S. Filed 10 December, 1872.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1874.

No. 80.

THE COUNTY OF CHAMBERS, PLAINTIFF IN ERROR,

vs.

HENRY CLEWS & COMPANY.

In error to the District Court of the United States for the Middle District of Alabama.

R. T. MERRICK, *For Plaintiff in Error.*

Judd & Detweiler, Printers.

Supreme Court of the United States.

DECEMBER TERM, A. D. 1874.

No. 80.

THE COUNTY OF CHAMBERS, PLAINTIFF IN ERROR,

vs.

HENRY CLEWS & COMPANY.

In error to the District Court of the United States for the Middle District of Alabama.

The case of the County of Lee *vs.* Henry Clews & Co., No. 78, is substantially the same with this case, and this brief is therefore filed also in that case.

ABSTRACT OF THE CASE.

This is a suit at common law, instituted in the district court of the United States for the middle district of Alabama, by Henry Clews & Co., of New York, against The County of Chambers, in the State of Alabama, to procure payment of 372 coupons, of the value of $14,880, attached to certain bonds alleged to have been issued by that county in aid of a railroad chartered to run through it. The bonds, 150 in number, and for $1,000 each, bear date January 1, A. D. 1870, are made payable January 1, A. D. 1890; and the coupons, being for interest at the rate of eight per cent., are made payable on the first day of July and January in each year.

Clews & Co. claim to be the owners of all the bonds, and sue for the coupons, which had become due and remained unpaid at the time of the commencement of the suit—four coupons on each bond, or four hundred in all.

The bond is set out in the declaration, and is as follows:

UNITED STATES OF AMERICA.

STATE OF ALABAMA, *County of Chambers.*

No.] $1,000.

1,000 DOLLARS.

Know all men by these presents that the county of Chambers, of the State of Alabama, acknowledges to owe the Eufaula, Opelika, Oxford and Guntersville Railroad Company, or the bearer hereof, one thousand dollars on the first day of January, A D. 1890, at the agency of the Eufaula, Opelika, Oxford and Guntersville Railroad Company, in the city of New York, with interest thereon at the rate of eight per cent. per annum, payable on the first days of July and January of each year at said agency, in the city of New York, upon the presentation and surrender of the coupons hereto attached as they severally become due. This bond, being one of a series of one hundred bonds, of one thousand dollars each, numbered from one to one hundred, inclusive, making an aggregate of one hundred thousand dollars, issued by said county of Lee under authority and in pursuance of an act of the General Assembly of the State of Alabama, entitled "An act to authorize the several counties, towns, and cities of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their interests." Approved, December 31st, 1868.

1,000 DOLLARS.

In witness whereof, the judge of probate and county treasurer have signed this bond, and caused the seal of the court of probate of said county of Chambers to be hereto affixed, this first day of January, A. D. 1870.

[SEAL.]

JOHN APPLEBY,
Judge of Probate.
JO. GRACE,
County Treasurer.

Attached to each of said bonds were forty coupons, numbered from one to forty, inclusive, the first coupon on each of said bonds being in substance as follows:

STATE OF ALABAMA, *County of Chambers.* $40.00.

Forty dollars will be due and payable on the first day of July, 1870, at the agency of the Eufaula, Opelika, Oxford and Guntersville Railroad Company, in the city of New York, being six months'

interest on bond No. —— for $1,000 issued by the county of Chambers in payment of subscriptions to Eufaula, Oxford and Guntersville Railroad Company.

Jo. GRACE, *Treasurer.*

The defendant pleaded the general issue and two special pleas, numbered in the record *second and third.*

The *second* plea set forth that the county of Chambers had failed to comply with certain requirements of the act of 31st December, 1868, under which said bonds were issued and that "*said bonds and coupons in the complaint mentioned were issued* without *authority of law, and are void, and that the plaintiffs are not* bona fide *holders thereof without notice,*" &c.

The *third* plea set forth, that a bill had been filed by certain citizens, tax-payers of the county of Chambers, in the court of chancery for the 5th district of Alabama, against the county commissioners and the railroad company, and that such proceedings were had in said suit that at the December term, 1871, of said court, a decree was rendered *perpetually enjoining the defendants to said bill from issuing said bonds, or procuring the issue thereof,* and that the bonds and coupons set out in the declaration in this case. "*were issued after said bill was filed, and whilst the same was pending.*"

[In the case of the county of Lee, (No. 79,) a similar plea is interposed, but more elaborately set forth, and concludes with the averment, "*that at the time of the rendition of said decree, the said railroad company, one of the parties to said suit in the chancery court, held and owned an interest in said bonds and coupons.*]

The plaintiffs joined issue upon the first plea, and demurred to the two special pleas; and their demurrers were sustained.

At the trial, the plaintiffs offered and were allowed to read the bonds and coupons in evidence; to which the defendant objected on the ground: 1st. That there was no evidence to show that the defendant was authorized to issue them; 2d. That there was no evidence to show that the seal attached to

said bonds is or was the seal of said probate judge or of the defendant; and 3d. That there were no revenue stamps of the United States attached to said bonds or coupons. Two *ex parte* depositions, taken under the judiciary act, one that of Henry Clews, one of the plaintiffs, and the other that of a notary public, were read to show that the plaintiffs were the owners of the bonds and coupons, and that they had been duly presented for payment.

The only testimony offered by the defendant was a transcript of the record of the proceedings of the county commissioners, which was excluded as irrelevant, and that of the president of the railroad company, to show that there was no organized company in existence at the time of the alleged issue and no directors to ask for the subscription by the county to the capital stock of the railroad company, and fix the price thereof to be paid in bonds as provided for by the 1st section of the act of 1868.

Assignment of Errors.

1. The court below erred in overruling the defendant's third plea, that these bonds had been declared null and void by a court of competent jurisdiction, and their payment enjoined.

2. It erred in overruling the second plea, that the bonds and coupons sued on had been issued contrary to law, and that the illegality was known to the plaintiffs when they took them.

3. It erred in admitting the bonds and coupons in evidence without proof of their due execution by the defendant and without being stamped according to law.

4. It erred in refusing to allow the defendant to show by a transcript from the records of the proceedings of the county commissioners court and the testimony of John L. Pennington that the bonds had been issued without authority of law.

5. It erred in peremptorily instructing the jury to render a verdict for the plaintiff.

6. It erred in instructing the jury that according to the law and the evidence the plaintiffs were entitled to recover, because the act of Alabama, of December 31, 1868, under which these bonds are claimed to have been issued, was an unconstitutional and invalid enactment.

BRIEF FOR PLAINTIFF IN ERROR.

I.

The defendants' third plea was a good one, and the demurrer to it should have been overruled, and the plaintiffs should have been required to file a replication to it, so as to bring the matters stated in it to an issue for the jury.

If, as the plea alleges, the bonds were issued without authority, and were void in law, and the plaintiffs were affected with knowledge of the invalidity by reason of their not being *bona fide* holders without notice, that was certainly a valid ground of defense which the defendant should have been allowed to establish by testimony, if it could so do.

It does not appear that there was any law or rule of court requiring such a plea as this to be verified by affidavit. If there was, that would have been good ground for a motion to strike the plea from the record, not for a demurrer. Whether the matters stated in the plea were or were not true in fact, was a question for the jury, and not one of law proper to be decided on demurrer. Neither is there any duplicity in the plea; for its only allegation is that the plaintiffs had notice of the illegality alleged to have attached to the issue of the bonds. An allegation of illegality alone might not have been sufficient. It was necessary further to aver that the plaintiffs had notice of the fact. The plea is simply a statement of matters tending to show the illegality, with an averment of such illegality, and of the knowledge thereof by the plaintiffs.

The plea avers that the railroad company did not "by its president, and a majority of its directors, in writing, propose to the said defendant that the said defendant shall subscribe for and take an amount of the capital stock of said railroad company, named in said proposal, at a certain price per share and pay for the same in such bonds of said defendant as shall be set forth in said proposal," &c.

Without such application, as required by the act of December 31st, 1868, (p. 514, acts of 1868,) the county commissioners' court was without authority to issue the bonds of the county.

The railroad company in question was incorporated under the act of December 29, 1868, entitled "an act to provide for the creation and regulation of railroad companies in the State of Alabama," and under that act the company could be in no condition to make an application for county subscriptions to its capital stock until *ten per cent.* of the capital stock of the company had been subscribed and a board of directors elected and qualified. (See sec. 9, act 29th December, 1868.) A proposition made by the original corporators named in the certificate of incorporation of the company and not by the president and directors of such company duly qualified and elected, is not a proposition made in compliance with the act of December 31st, 1868, and such proposition so made does not authorize the commissioners' court of the county to exercise the powers conferred by the said act; and any order made under such circumstances by said court is void, and any bonds issued in obedience to such orders are issued without authority and are not binding upon the county.

Trammell *et al. vs.* Pennington *et al.*, 45 Alabama Reports, 673.

This question will be hereinafter recurred to in considering the rulings of the court in reference to the offer of evidence by the defendant.

II.

1. The bonds and coupons were admitted in evidence, without any testimony whatever to show that they had been authorized to be issued by the county.

The execution of obligations purporting to be those of bodies corporate, whether private or public, must be shown by competent evidence. The corporate seal of the defendant, and the signatures of its authorized officers and agents, as well as their authority, must be proved before the county can be held liable. The seal upon these bonds is the seal of the probate court of the county, and the signatures are those of the judge of probate and the county treasurer, or of some persons who sign their names as such. Now, there is nothing whatever in the evidence before the jury to show that the probate court or the probate judge had any authority to bind the county to the payment of money. There is nothing to show that the person who signed himself as county treasurer was such treasurer, and the judge of probate is by stature, *ex officio*, one of the five judges of "the court of county commissioners," and styled the principal judge of said court. (Revised Code of 1867, § 825.) It was certainly not within the scope of the ordinary functions of either the probate judge as such, or of the probate judge acting as principal judge of the court of county commissioners, or the county treasurer to issue bonds; and their authority must be shown by some positive proof.

It would seem that there was a "court of county commissioners" authorized under proper circumstances to issue these bonds, and it is admitted that this court *was a court of record.* But this court was not the probate court; and it does not appear from any evidence before the jury that it adopted the seal of the probate court, or authorized it to be affixed to these bonds.

Sufficient *prima facie* proof of the execution of a promissory note is made when the signature of the maker is proved.

In the case of specialties, proof of the seal also is required. When a corporation is alleged to be the party bound, the authority of its agents must be shown. Neither signature nor seal nor authority of agents was attempted to be proved in the trial of this cause; and the jury was directed to find for the plaintiff upon the exhibition merely of certain pieces of paper which the defendant had repudiated in its pleas. A grosser disregard of the first principles of evidence than this can scarcely be conceived. And it is respectfully submitted that it is wholly unnecessary to adduce authorities against the decision of the court below upon this point.

2. But it is contended that the proof above indicated was not requisite, because the *factum* of the instrument sued on was not put in issue by the sworn plea of defendant.

Section 2682 of the code of 1867 provides that "all written instruments, the foundation of the suit, *purporting to be signed by the defendant*, his partner, agent, *or attorney-in-fact*, must be received in evidence without proof of the execution, unless the execution thereof is denied by plea verified by affidavit."

It is apparent that this provision does not apply to the instruments sued on in this case, for these instruments do not purport to be signed by "the defendant," nor by its "agent," or "attorney-in-fact;" they purport to be signed by one "John Appleby, *judge of probate*," without indicating in what relation said Appleby stands to said defendant, either personally or in his official capacity, and by one "Jo. Grace, county treasurer," without specifying of what county he is treasurer, or stating what authority he claims to possess in regard to these bonds and coupons by reason of his office as treasurer; neither do these instruments purport to have the seal of the "court of county commissioners of Chambers county," declared by statute to be a court of record, vested with exclusive jurisdiction in the municipal affairs of said county, and the only authority authorized by law to issue

said bonds on behalf of said county. On the contrary, they bear the seal of "the court of probate," another and distinct tribunal, having no authority whatever in the municipal affairs of said county, but exercising a totally different and distinct jurisdiction as a court of law, limited and defined by statute.

Revised Code of Alabama, 1867, § 781.

3. The omission of United States revenue stamps from the bonds was a circumstance of which the defendant was entitled to avail itself.

In the case of *Campbell* vs. *Wilcox*, 10 *Wallace*, 421, it was decided by this court that it was a fraudulent and not an accidental omission of stamps at which the penalty of the statute was leveled, which declared those instruments invalid and inadmissible in evidence which were without such stamps; and that such fraudulent omission, if available at all to the maker of the instrument, could only be set up by special plea or *urged on the trial* and could not be taken advantage of on demurrer. And further on, in the same case, it was held that at the trial compliance with the statute must be proved by the plaintiff if denied by the defendant. The objection in this case was urged at the trial, and the plaintiffs did not show that the statute had been complied with; and the defendant was not allowed an opportunity to show that the omission was fraudulent. The objection was summarily overruled without any proof on either side. As there had been no proof to show that the defendant was the maker of these bonds, the defendant was entitled to make the objection and was not liable to the estoppel intimated by the court, in the case cited, as proper to bar the maker of an instrument. The statute requiring stamps on bonds and similar instruments, was in force at the time of the alleged issue of these bonds; and it is submitted, therefore, that the absence of stamps was a proper subject of inquiry at the trial, and the

unconditional admission of the bonds in evidence was improper.

The question presented in the case of *Campbell* vs. *Wilcox* was as to the validity of the instrument; the question presented in this record is as to the admissibility of the instrument in evidence. The two questions depend upon distinct and different provisions of the acts of Congress, and involve very different consequences to the parties affected by them.

In the case of *Pugh* vs. *McCormick*, (14th Wall., 361,) the several acts of Congress were carefully examined and considered by the court as they effect the admissibility in evidence of unstamped instruments, and the conclusion arrived at that such instruments could not be used in evidence.

In commenting on this legislation and referring particularly to the act of 1866, the court says, "Had legislation stopped there *the ruling admitting the note in evidence would certainly be erroneous*, but the act of July 14, 1870, amends the preceding act," &c.

The act of August, 1866, (14th Stat., p. 143,) authorized the collector of the revenue, where the stamp had been omitted by reason of accident, mistake, or inadvertence, to affix a stamp thereto under certain circumstances, and remit the penalties; provided this authority was exercised within twelve months from the date of the instrument, or within twelve months from August 1st, 1866. But that act also provided, (see p. 143, 14th Stat.,) "that no deed, document, writing, or paper, required by law to be stamped which has been signed or issued without being duly stamped, or with a deficient stamp * * * shall be used as evidence in any court until legal stamp or stamps denoting amount of tax shall have been affixed thereto as prescribed by law."

The note in question in the case of *Pugh and McCormick* had been stamped by the collector before it was offered in evidence, but not within the time limited by the act of 1866 for the collector to exercise such authority.

Pending the writ of error the act of July 14th, 1870, was passed, extending the time within which the collector of revenue might exercise the authority conferred by the act of 1866. The court held the act of 1870 retrospective in its operation, and therefore making valid the act of the collector in respect of the note sued on. The court, therefore, though deciding that the court below had erred in admitting the note in evidence refused to reverse the ruling and remand the cause for the reason as stated on page 374, "that the error has become immaterial."

Since the act of 1870 two acts have been passed by Congress having relation to this matter, viz: the act of June 6th, 1872, modifying or repealing previous acts imposing stamp duties, and the act of June 23d, 1874, which provides as follows: "that all instruments, documents, and papers heretofore made, signed, or issued, and subject to a stamp duty or tax under any law heretofore existing and remaining unstamped may be stamped by any person having an interest therein * * * at any time prior to the first of January, 1876, and said instruments, documents, and papers, shall be as valid to all intents and purposes as if stamped when made or issued; * * * *provided*, that to render such stamping valid the person desiring to stamp the same shall appear with the instrument, document, or paper, before some judge or clerk of a court of record and before him affix the proper stamp; and the said judge or clerk shall indorse on such writing a certificate under his hand * * setting forth the date at which, and the place where, the stamp was so affixed and * * * that the stamp was duly canceled in his presence."

The act of June, 1872, does not effect this question.

Under the act of 1874, the holder of the bonds sued on is authorized to stamp them himself, in the manner and under the circumstances prescribed, as was the collector under the acts of 1866 and 1870.

But the defendant in error in this case has not availed

himself of the act of 1874, and until that is done the instruments offered in evidence are not admissible. It was error, therefore, in the court below to allow them to be read to the jury, and that error has not "become immaterial," as in the case of Pugh and McCormick.

III.

The defendant was not allowed to show that, at the time of the proposal for and issue of these bonds, there was no organized railroad company in existence, and consequently no person to whom the bonds could have been lawfully issued.

If there was no such company in existence the transaction was a fraud in its inception; and the defendant should have been allowed to show the facts which constitute the fraud.

While it is admitted, in accordance with the decisions of this court, that a party taking such bonds as these in good faith is bound to look only to the legal authority under which the public agents acted, and that, if such authority is sufficiently comprehensive, he has a right to presume that those empowered to act and acting under it had complied with its requirements, a holder who has not acted in good faith, or who has notice of a fraud in the transaction, will not be protected. The presumption referred to is a presumption that all such details have been properly complied with which a holder cannot in the nature of things be supposed to be cognizant of. Such a presumption cannot arise in favor of a party who has notice, actual or constructive, that one of the alleged parties to the contract sued on is a fictitious entity without any actual existence whatever, as was this railroad company.

The court also refused to allow the defendant to read in evidence a duly certified transcript from the records of the court of county commissioners of the county of Chambers, showing the proceedings of said court in regard to the subscription to

the stock of the railroad company, the application of said railroad company for such subscription, and the issue of bonds by said county.

This transcript was offered for the purpose of showing that the railroad company had not perfected its organization in such manner as was required by statute in order to enable it to apply for and receive a subscription to its capital stock from said county, or to receive the bonds in payment for such subscription.

Trammell *et al. vs.* Pennington *et al.*, 45 Alabama Reports, 673.

IV.

The act of December 31st, 1868: "To authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interests," under which the bonds in question were issued was in violation of the constitution of the State.

The constitution of the State provides as follows: §33 Art. IV, "*The State shall not engage in works of internal improvement*, but its credit in aid of such may be pledged by the General Assembly on undoubted security by a vote of two-thirds of each House of the General Assembly."

It is not proposed to discuss the power of a State Legislature, when unrestricted by a State constitution, to authorize municipal corporations or *quasi* municipal corporations to take stock in railroad companies, or to levy taxes to aid in the construction of railroads. This court has said in the case of *The Railroad Company* vs. *The County of Otoe*, that it has "asserted the doctrine nearly a score of times;" that such is a legitimate exercise of legislative power. Except for the court itself, therefore, the principle is not open to discussion. It may not be improper, however, to refer to the case of the *Detroit and Howell Railroad Company* vs. *Township Board*

of Salem, reported in the Law Times of September, 1870, and decided by Judge Corley, in which he says: "The best judgment of the legal profession, so far as I have been able to judge has always been against this species of railroad aid, and there has been a steady and persistent protest which no popular clamor could silence against the decisions which could support it. This protest has of late been growing stronger instead of fainter; and if the recent decisions alone are regarded, the authority is clearly with the protest."

The question presented upon this record is as to the limitation imposed by the constitution of the State.

Has the article above quoted reference and application to the State only, as a corporation or government, or is it a limitation upon the legislative power of the State restraining its general authority so that it cannot permit or require the subordinate political divisions of the State to do that which the State itself is prohibited from doing?

Counties do not possess corporate franchises under special charters. Their functions are wholly of a public nature. "They exist under the general laws of the State which apportion the territory of the State into political divisions for *convenience of government*, and require of the people residing within these divisions the performance of *certain public duties as part of the machinery of the State;* and in order that they may be able to perform these duties vest them with certain corporate powers."

Cooley's Constitutional Limitations, p. 240.

They are therefore sometimes called *quasi* corporations.

Riddle *vs.* Proprietors, &c., 7 Mass., 186.

Private corporations are composed of individuals who have come voluntarily into the association for the purposes of private enterprise and have given control over their common property to the corporate authorities under such limitations as they may have thought proper to impose. Counties are political subdivisions of the State, organized by the general

law, and not by the voluntary act of their inhabitants, to assist in the government of the State, and their authorities have no other control over the property of the inhabitant than such as may be necessary for the local civil government of the people.

The legislature cannot require the performance by private corporations of any duties it may think proper in its discretion to impose, but it may require the counties to do whatever it pleases, provided that in making such enactions it keeps within the limits prescribed for its power by the constitution of the State.

Whatever it may permit or authorize the counties to do, it may command them to do, and the judicial department will enforce the execution of the legislative mandate.

It might perform almost the entire aggregate of legislative duties through the county organizations.

The entire territory of the State is divided into counties, and consequently the inhabitants of the counties constitute the people of the State.

A State is a voluntary association of individuals which precedes the formation of government. The government of the State is the organization through which the State exercises its political power. If that government is, by the organic law, prohibited from imposing a particular burthen on the State, or the people constituting the State, and it be admitted that it cannot impose such burthen by the exercise of legislative power acting directly upon the entire people, it would seem illogical and inconsistent to say that the legislature may, nevertheless, impose that burthen on the people through subordinate political agencies, acting in obedience to a legislative requirement.

In the case of *Railroad Company* vs. *County of Otoe*, 16th Wall., this court uses the following language:

"If a State can directly levy taxes to make donations to improvement companies or to other objects which, in the judgment of its legislature, it may be well to aid, it will be

found difficult to maintain that it may not confer upon its municipal divisions power to do the same thing. Counties, cities, and towns exist only for the convenient administration of the government. Such organizations are instruments of the State created to carry out its will. When they are authorized to levy a tax, or to appropriate its proceeds, the State through them is doing indirectly what it might do directly."

On the 29th December, 1868, the Legislature of Alabama passed an act to provide for the creation and regulation of railroad companies in the State of Alabama, giving great facilities for the creation of such organizations without number, authorizing them to traverse the State in every direction, and endowing them with the most extensive rights and franchises; but finding itself prohibited by the constitution from extending pecuniary aid *directly* to these schemes, and burdening the public for the benefit of those who were expected to operate them, it devised the plan developed in the act of December 31st, 1868, for plundering the people by using the county organizations throughout the State.

This act authorizes every *county, town, and city* in the State to subscribe to the capital stock of any and every railroad that might thereafter be "*located* by companies owning and controlling the same." It then directs that whenever any such company shall apply to any county to subscribe to its capital stock the question of such subscription shall be submitted to the people, and in case a majority are favorable thereto makes it imperative on such county to issue its bonds in payment of the amount subscribed and to levy and collect a special tax to pay the bonds so issued.

Even without any constitutional limitation upon legislative power, legislative ingenuity could not have involved the State in a broader and more reckless scheme of "works of internal improvement," and the tender justice of this act will be fully appreciated when it is recollected that in most of the counties of Alabama one class does the voting and another class pays the taxes.

The acts referred to have relation to the same subject, and taking them together they clearly indicate that the Legislature designed purposely to evade the limitation imposed upon its power by the constitution of the State.

But it is answered to these suggestions that the court of last resort of Alabama has determined that the act of December 31st, 1868, is not in violation of the constitution of the State.

Ex parte Selma and Gulf Railroad Company, 45th Ala. Reps.

Such was the decision in the case referred to, by a divided court, and it is respectfully submitted that the reasoning of the learned judge who pronounced that opinion will not commend its conclusions to very favorable consideration.

But is this court bound by that decision because determining a question arising in regard to the statute law and constitution of the State? Such might have been its effect prior to the adoption of the 14th art. of amendment to the Federal Constitution.

By that article it is provided as follows: "Nor shall any State deprive any person of life, liberty, or *property* without due process of law;" and it is submitted, that if the act of 31st December, 1868, requiring the property of the citizens to be taken by means of taxation, is repugnant to the constitution of the State, that property taken, or made liable to be taken, in consequence of its requirement, is taken without due process of law, and that the act is therefore subject to the jurisdiction of this court without reference to the decisions of the State court.

R. T. MERRICK,
For Plaintiff in Error.

Supreme Court of the United States.

DECEMBER TERM, 1874.

THE COUNTY OF LEE, *plaintiff in error*,
vs.
HENRY CLEWS & Co. } No. 79.

THE COUNTY OF CHAMBERS
vs.
HENRY CLEWS & Co. } No. 80.

Statutes of the State of Alabama referred to in argument of Attorney for Plaintiff in Error in above-entitled cases.

ACTS OF 1868.—ALABAMA.

No. 129. Page 462.

AN ACT *to provide for the creation and regulation of railroad companies in the State of Alabama.*

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That any number of natural persons, not less than five, may become a body corporate, with all the rights, powers, and privileges conferred and made subject to all the restrictions of this act. Corporators.

SEC. 2. *Be it further enacted*, That any number of persons as aforesaid, associating to form a company for the purpose of constructing a railroad, shall, under their hands and seals, make a certificate, which shall specify as follows: 1st. The name assumed by such company and by which it shall be known; 2d. The name of the place of the termini of said road, and the county or counties through which such road shall pass; 3d. The amount of Certificate of association.

capital stock necessary to construct such road. Such certificate shall be acknowledged before a justice of the peace and certified by the clerk of the circuit court, and shall record and carefully preserve the same in his office, and a copy thereof, duly certified by the Secretary of State, under the great seal of the State of Alabama, shall be evidence of the existence of such company.

Subscription to stock.

SEC. 9. *Be it further enacted*, That the persons named in said certificate of incorporation, or any three of them, shall be authorized to order books to be opened for receiving subscriptions to the capital stock of said company, at such time or times, and at such place or places, as they may deem expedient, after having given at least thirty days notice, in a newspaper published or generally circulated in one or more counties, where books of subscription are to be opened, of the time and place of opening books; and as soon as ten per centum on the capital stock shall be subscribed, they may give like notice for the stockholders to meet, at such time and place as they may designate, for the purpose of choosing seven directors, who shall continue in office until the time fixed for the annual election, and until their successors are chosen and qualified; at the time and place appointed, directors shall be chosen by ballot, by such of the stockholders as shall attend for that purpose, either in person or by lawful proxies; each share shall entitle the owner to one vote, and a plurality of votes shall be necessary for a choice; but after the first election of directors, no person shall vote on any share on which any installment is due and unpaid. The persons named in such certificate, or such of them as may be present, shall be inspectors of such election, and shall certify what persons are elected directors, and appoint the time and place for holding their first meeting; a majority of said directors shall form a board, and be competent to fill vacancies in their board, make by-laws, and transact all business of the corporation. A new

Meeting of stockholders.

election shall be annually held for directors, at such time and place as the stockholders, at their first meeting, shall determine, or as the by-laws of the corporation may require; and the directors chosen at any election shall, as soon thereafter as may be convenient, choose one of their number to be president, and shall appoint a secretary and treasurer of the corporation. The directors, before entering on their duties, shall each take an oath or affirmation faithfully to discharge their duties, and they shall, from time to time, make such dividends of the profits of said company as they may think proper.

No. 172. Page 514.

AN ACT *to authorize the several counties and towns and cities of the State of Alabama to subscribe to the capital stock of such railroads throughout the State as they may consider most conducive to their respective interest.*

Subscription authorized.

SECTION 1. *Be it enacted by the General Assembly of Alabama*, That any and every county of the State of Alabama, situated upon or adjacent to the main or branch line of the railroads of this State, as such lines are or may be hereafter located by the companies owning and controlling said roads respectively is authorized and empowered to subscribe for, take, and pay for the capital stock of such of the railroad companies of the State as they may deem most conducive to their interests, as hereinafter provided. The said railroad companies, by their president and the majority of their directors, may, in writing, propose to any such county that it shall subscribe for and take any amount of their capital stock, to be named in said proposal, at a certain price per share, and pay for the same in such bonds of the county as shall be set forth in said proposal.

Determined by elections.

SEC. 2. *Be it further enacted*, That upon the application of the president and directors of any of the railroad companies of Alabama to the *commissioner's court* of any county of the same, submitting proposals for a county subscription to the capital stock of said railroad company, the commissioner's court of said county in which application is made, is hereby authorized and required to order an election within sixty days after the meeting of said court, to submit the proposition of said railroad company to the qualified electors of said counties for their acceptance or rejection.

Manner of elections.

SEC. 3. *Be it further enacted*, That said elections shall be held in the several precincts of said county, as by law established, and shall be conducted in the same manner and by the same offi-

cers as are now provided by law, except wherein the same is altered by the provisions of this act.

Notice.

SEC. 4. *Be it further enacted*, That at least thirty days before such election, the court of county commissioners of the county in which such election shall be held are hereby authorized and required to give notice of the terms and the amount of the proposed subscription, by publication, or in such other manner as they may deem best, to give general notice to the voters of said county of the terms and amount of such subscription, and after such notice has been given, to prepare written or printed, or partly written and partly printed ballots, with the word "*subscription*," and like other ballots with the words "*no subscription*" thereon, for the use of the voters of said county.

Returns.

SEC. 5. *Be it further enacted*, That the returns of said election shall be made by the proper officer to the judge of probate of said county, whose duty it shall be to receive, count, estimate, and publish the vote thereof within three days after said election; and in the event of death, disability, or absence of said judge of probate, then, and in that event, it shall be lawful for the clerk of the circuit court of said county to receive, estimate, and publish the vote of said county, in the same manner as the judge of probate is required to do.

Subscription when so voted.

SEC. 6. *Be it further enacted*, That if it is found that a majority of the qualified voters of said county voting at the election shall have voted for "subscription," then and in that event, upon the announcement of the vote as hereinbefore provided, the proposition of said company shall be deemed and held to be accepted; and the said court of county commissioners are hereby authorized and required to make the subscription voted for in behalf of said county to the capital stock of said company in the manner and for the amount set forth in said application, and to deliver to the said railroad company, in payment of said subscription, *bonds of the county*, having not less than ten nor more than twenty years to run, with interest-coupons attached for semi-annual interest, payable at

Certificate of stock.

such times and places as may be agreed upon between the said railroad company and the judge of probate of said county. On the issuance of said bonds, certificates to the capital stock to an amount corresponding with the amount subscribed by said county shall be placed in the hands of the treasurer of said county.

Taxes.

SEC. 7. *Be it further enacted*, That the court of county commissioners of said counties in which the electors shall have voted in favor of said subscription are hereby authorized and required to levy and assess, in the same manner as is now required by law for collection of State and county taxes, such tax as may be necessary to meet the interest falling due semi-annually on said bonds, and such other reasonable amount, to be determined by said court, as will pay the expenses of assessing and collecting said tax and for issuing said bonds: *Provided*, That in no case shall such tax exceed one per cent. per annum upon the value of the real and personal property in said county as yearly assessed and returned to the proper officers.

Powers of county commissioners.

SEC. 12. *Be it further enacted*, That the courts of county commissioners of the various counties are hereby vested with power to do any and all acts to carry out all the provisions of this act which are not inconsistent with the act itself and the laws of the State and the United States.

CHAPTER 7.

The Court of County Commissioners.

§825 (697.)—*How constituted; a court of record.*—There is in each county a court of record, styled the court of county commissioners, composed of the judge of probate, as principal judge, and the four commissioners, who are elected at the times prescribed by this code, and hold office for three years.

§826 (698.)—*Vacancy, how filled.*—In case of a vacancy, it is to be filled by the court; and the person so appointed holds office for the remainder of the term of the commissioner in whose place he is appointed.

§827 (699.)—*Commissioners ineligible to certain offices.*—No county commissioner is eligible to or must discharge the duties, either as principal or deputy, of any office which is filled or the vacancy in which is supplied by the court or its members.

§828 (700.)—*Quorum of court.*—This court may be held by the judge of probate and two commissioners, or by three commissioners without the judge of probate; and if as many as two commissioners fail to attend during the first two days of any term, the judge of probate may hold the court.

§829 (701.)—*Regular terms, &c.*—Regular terms of this court are held on the second Monday in February and August and the first Mondays of April and November; but the time of holding terms may be changed by such court to suit the public convenience by an order, to be entered on their minutes, and due notice given thereof.

§830 (702.)—*Special terms, notice of.*—In cases where officers are to be appointed, or vacancies supplied, or any other special duty required by law to be performed, a special term must be held, by direction of the judge of probate, upon ten days notice by advertisement in some newspaper in the county, or by posting up at the court-house door and two other public places in the county notice of the same.

§831 (703.)—*Original jurisdiction of court.*—This court possesses original jurisdiction in relation to the establishment, change, or discontinuance of roads, bridges, causeways, and ferries within its county, to be exercised in conformity with the provisions of this code.

§832 (704.)—*Authority of the court.*—It has authority—

1. To direct and control the property of the county, as it may deem expedient, according to law.

2. To levy a general tax, for general, and a special tax, for particular, county purposes, according to the provisions of this code.

3. To examine, settle, and allow all accounts and claims chargeable against the county.

4. To examine and audit the accounts of all officers having the care, management, collection, or disbursement of money belonging to the county, or appropriated for its use and benefit.

5. To make such rules and regulations for the support of the poor in the county as are not inconsistent with any law of the State.

6. To punish for contempt by fine, not exceeding ten dollars, and imprisonment not exceeding six hours.

7. To exercise such other powers as are or may be given it by the laws of this State.

&c &c

CHAPTER 5.

Courts of Probate.

§781 (661.)—*The judge, his term of office.*—A judge is elected in each county at the time hereinbefore prescribed, who is styled the judge of probate, and who holds his office six years from the day of his election, and until the election and qualification of his successor, except in cases of removal from office.

§790 (670.)—*Original jurisdiction of courts of probate.*—Courts of probate have, in the cases defined by law, original jurisdiction of—

1. The probate of wills.
2. The granting of letters testamentary and of administration, and the repeal or revocation of the same.
3. Of all controversies in relation to the right of executorship or of administration.
4. The settlement of accounts of executors and administrators.
5. The sale and disposition of the real and personal property belonging to, and the distribution of, intestate estates.
6. The appointment and removal of guardians for minors and persons of unsound mind.
7. All controversies as to the right of guardianship and the settlement of guardian's accounts.
8. The binding out of apprentices, and all controversies between master and apprentice.
9. The allotment of dower in lands in the cases by law provided.
10. The partition of lands within their counties.
11. The change of name of any person residing in their county, upon filing his declaration in writing, signed by him, stating the name by which he is known and the name to which he wishes it to be changed.
12. In such other cases as jurisdiction is or may be given to such courts by law, and in all cases to be exercised in the manner prescribed by law.

Lc Lc

Supreme Court of the United States.

No. 356.

THE COUNTY OF LEE,

vs.

HENRY CLEWS & CO.

No. 357.

THE COUNTY OF CHAMBERS,

vs.

HENRY CLEWS & CO.

Without waiving the motion previously made to dismiss each of these cases, and the writs of error therein, the appellee submits the following brief, to be considered only in the event said motions are overruled.

Brief of SAM'L F. RICE, of Counsel for Appellee.

Each of these suits was brought, by holders for value, to recover the past due and unpaid coupons of bonds issued by the defendant as a county. The bonds and coupons were strictly commercial paper, and purport to be issued under and in pursuance of an act of the Legislature of Alabama, which clearly conferred authority to issue them.

The act conferring this authority, is a general and public act of the Legislature, of which the courts of the United States take judicial notice.—See Pamphlet Acts of 1868 of Alabama, pp. 514–520.

The constitutionality of that act has been settled by the Supreme Court of Alabama, since its June term, 1871.—*Ex parte* Selma & Gulf Railroad Company, 45 Ala. Rep. 696, 724. See, also, Lockhart v. The City of Troy, 48 Ala. Rep. —; Commissioners Court of Limestone v. Rather, 48 Ala. Rep.

Repeated decisions of the Supreme Court of the United States, show that no such defences as were disclosed in the primary court, can be available against holders for value of the coupons here sued on, especially when, as here, the title of the holders accrued before the maturity of the bonds or coupons.—Grand Chute v. Winegar, 15 Wallace, 355, and cases therein cited; Lynde v. The County, 16 Wallace, 6; St. Joseph Township v. Rogers, *ib.* 644; Railroad Company v. Otoe, *ib.* 667.

A stamp is not required to such coupons or instruments as are here sued on.—Pugh v. McCormick, 14 Wallace, 374-375.

The revenue stamp required by the Internal Revenue Law, to be attached to an instrument, *forms no part of that instrument.*—Miller v. The People, 52 New York Rep. 394; People v. Franklin, 3 Johns. Cases, 299; Same Case, 11 American Rep. 706.

The settled law in Alabama is, that unless the stamp is omitted *with a fraudulent intent*, the instrument is *admissible in evidence.* Its validity may be tried after its introduction in evidence.—Perryman v. The City of Greenville; Lightfoot v. Leverett et al.; Hardigree v. Mitchum, decided at June term, 1874, and not yet published in the Reports.

The Supreme Court of the United States hold, that it is "a fraudulent and not an accidental omission at which the penalty is levelled;" and that such fraudulent omission, if

available at all to the maker, "can only be set up by special plea or urged on the trial." Certainly, such omission, without any offer to prove it fraudulent, cannot authorize an objection to the instrument when offered in evidence, and thus exclude the instrument wholly from the jury.—Campbell v. Wilcox, 10 Wallace, 421; Pugh v. McCormick, 14 Wallace, 375.

The application of these principles to the record, compels the conclusion, that there was no reversible error in any of the rulings of said District Court.

The grounds of objection to *the introduction of the bonds and coupons in evidence*, are specified; and therefore all other objections were waived.—Creagh & Forwood v. Savage, 9 Ala. Rep. 959.

The first of these specified grounds, is, that there was no evidence that said bonds and coupons were authorized to be issued by the defendant. A complete answer to this, is, that the authority is contained in the aforementioned general and public act of the Legislature, of which all the courts of the United States are bound to take judicial notice.

The second of these grounds, is, that there was no evidence that the seal annexed to each of said bonds is or was the seal of said probate judge, or of the defendant. This is frivolous. If any answer to it were needed, it would be sufficient, that the factum of no written instrument can be questioned, unless the defendant has, by *sworn* plea, denied the execution of it. There was no such *sworn* plea here.—Sorrell v. Elmes, 6 Ala. R. 706; Lazarus v. Shearer, 2 Ala. R. 718.

The third and last of these grounds, is, "that neither said bonds or coupons were stamped with revenue stamps of the United States as required by the act of Congress." This was *the mere assertion* of the objector. No evidence of its truth as matter of fact, was given or offered in its support. The stamp *is no part of these instruments.*—Mil-

ler v. The People, *supra*. No court will indulge any presumption in favor of such an objection. The burthen of proving the objection to be true in fact, was upon the objector. No such proof was made or offered; and the Supreme Court will not put the District Court in error, by a presumption that an objection was true in fact, of the truth of which the objector neither gave or offered any evidence. Clearly, there is nothing in this ground of objection which warrants a reversal of the judgment of the District Court.